Supreme Court, U.S.
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SUPREME COURT, U.S.

No. 79

Helen's Kitchen, Inc., and [illegible],

Petitioners,

vs.

People of the State of California,

Respondent.

Application to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

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IN THE

Supreme Court of the United States

October Term, 1962
No.....

HAROLD EUGENE WENZLER, SR., and JOHN IMLAY,
Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Opposition to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Respondent prays that a Writ of Certiorari to review the judgment of the Appellate Department of the Superior Court, entered in the above-entitled case on October 30, 1962 be denied.

Statement of the Case.

The petitioners on January 2, 1962 were charged in separate, but identical, two-count complaints with violations of Section 311.2 of the Penal Code of the State of California. It was alleged in the said complaints that petitioners had knowingly distributed certain "obscene matter, to wit: Motion Picture Films at the

Oaks Theatre, 85 North Fair Oaks Boulevard" in the City of Pasadena, County of Los Angeles, State of California, in violation of the said statute [C. T. 3, 24].

The cause came on for trial on March 19, 1962 before the Honorable Louis T. Fletcher, a Judge of the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California. By stipulation, the causes were consolidated for trial before the court sitting without a jury [C. T. 79-80]. The trial was concluded on March 21, 1962. On March 28, 1962, the court found petitioners guilty on Count I of the complaint and not guilty on Count II [C. T. 8, 29].

Jurisdiction.

From judgments of conviction rendered by the Municipal Court of the Pasadena Judicial District in Los Angeles County, State of California, after a joint trial before a court sitting without a jury, petitioners prosecuted their respective appeals to the Appellate Department of the Superior Court of the State of California, County of Los Angeles. The judgments of affirmance by the Appellate Department were dated and entered on October 23, 1962.

Due and timely petitions for rehearing, or in the alternative, for certification of the cases to the District Court of Appeal were denied on November 9, 1962.

By order of Mr. Justice Brennan dated December 18, 1962, the judgments of conviction were stayed pending the timely filing and disposition of a petition for Writ of Certiorari. By order of Mr. Justice Douglas dated January 29, 1963, the time to file the peti-

tion for Writ of Certiorari was extended to April 4, 1963.

Subsequent to the denial of a rehearing and in the alternative for certification to the District Court of Appeal as aforestated, petitioners filed for a Writ of Habeas Corpus No. 8845, in the District Court of Appeal. Said petition was denied on February 18, 1963. Petitioners then filed for a Writ of Habeas Corpus No. 7344, to the Supreme Court of the State of California. The Supreme Court of the State of California denied said petition on March 20, 1963.

In a habeas corpus proceeding, the Supreme Court of the State of California could determine whether petitioners were deprived of their constitutional rights and whether the statute is constitutional.

In re Bell, 19 Cal. 2d 488.

Petitioners attempt to invoke jurisdiction under 28 U. S. C. 1257 (3).

Questions Presented.

1. The first question is improperly and erroneously stated. The prosecution is required to and did prove that the film in question went beyond customary limits of candor in description or representation of sex or nudity, and that the people have the burden to prove that the film exceeds contemporary community standards.

2. In regard to the second question, petitioners were not refused the right to establish contemporary standards, they were granted permission, the evidence was admitted and there was no violation of free speech, press, or due process.

3. The film in question being competent evidence, clearly shows that it exceeds the customary limits of candor in description or representation of sex or nudity.

4. If the film is found to be obscene, then it is not constitutionally protected.

5. Petitioners' convictions were based upon proof of scienter.

6. The knowledge of obscenity of the film was established by direct and circumstantial knowledge of the contents by both defendants.

Federal Questions.

(a) Free speech provision of the Constitution is not applicable if the film is obscene.

(b) The film being so patently obscene could conceivably establish a prima facie case. However, it does not follow as petitioners claim, that the burden is solely on the accused to show that the matter does not exceed contemporary standards.

(c) Other competent evidence was admitted to establish the contemporary standards.

(d) The other films shown and introduced into evidence on the question of exceeding contemporary standards, were not as obscene as Exhibit 1. The film in question has no title to it, no sound, no plot, nothing but a woman in progressive stages of disarray and nudity making erotic motions and appealing to prurient and lewd desires. The record clearly shows, as set forth in this

petition, that there was testimony and evidence on both sides pertaining to the question of contemporary standards. (Petition for Writ of Certiorari, p. 9, Pars. 2 and 3.)

(e) Although petitioners may not have seen the film in question until it was shown at the trial, the evidence established that they knew the contents and Wenzler stated that he was responsible and had viewed one of these films and that they were all similar, or words to that effect.

What Is Obscene Is a Question of Fact.

Defendants offered into evidence pictures, magazines, etc. [C. T. 167-170], attempting to establish contemporary standards. They also offered testimony by men from Los Angeles who have been in the motion picture field [C. T. 234-240] and [C. T. 242-252]. To the effect that Exhibit 1 was not obscene because the genital organs were not shown.

Defendant in his brief to the Appellate Department claimed "that the experts called by the prosecutor in rebuttal of the experts of the defendants were unreliable and their testimony should be discounted." [C. T. 293-292] and [C. T. 294-296].

Although the judge earlier in the trial did not believe it necessary to permit other evidence on the question of contemporary standards, the court changed its mind and permitted other films, books, pictures and testimony to establish contemporary standards. (Petitioners refer to the evidence thus admitted in the Petition for Writ of Certiorari, page 9, Paragraphs 2 and 3).

We respectfully submit that the trial court was in the best position to make a determination as to the reliability, credibility and value of the testimony.

Reasons for Denying the Writ.

I.

There was creditable evidence of what the contemporary standards were on December 19, 1961, based upon the testimony of witness, Richard Hubbell, who has been a Pasadena resident since 1923 and a member of the Pasadena Board of Review for four and one-half years (said Board being the official body to view and pass upon motion pictures shown in Pasadena); and upon the testimony of Lt. Gerald Wright, who has been with the Pasadena Police Department for nineteen years, who stated his qualifications were based upon having seen many films, conversations with law enforcement officials with legal officers of Pasadena and from reading discussing decisions of State and Federal Courts with legal representatives.

Both of the above witnesses testified that in their opinion, the film was obscene.

II.

The prosecution proved that the defendants had knowledge of the nature of the film [Ex. H].

It was established that Defendant Wentzler was the owner and manager of the Oaks Theater at 85 North Fair Oaks Avenue, Pasadena, California, and that John Imlay was his employee.

Officer Harrel testified that he purchased people's Exhibit I from John Imlay at the said theater on December 19, 1961. Imlay testified that he had been

working at this theater for about a year, that he admitted going in and out of the theater; and that he told Officer Harrel that People's Exhibit I was the same or similar to the films that are being shown inside this theater.

Defendant Wenzler testified that he had viewed part of a similar film and ordered them; that he viewed one of the group of films he received at a friend's house and didn't think it was obscene. Upon viewing the People's Exhibit I, he did not believe it was obscene. He told Lt. Wright that the films being sold at the candy counter are approximately the same as those shown on the screen inside; and that he was the responsible person for showing and selling these films.

Judge Fletcher, in finding the defendants guilty, established that there was sufficient creditable evidence that they knew the nature of the films and that in the Court's opinion, People's Exhibit I was in fact "obscene."

The People rely on the film in answering Appellant's contentions pertaining to whether or not this film is "obscene" as defined by statute and case law.

The petitioners introduced into evidence over the objection by the People, pictures and photographs of nude and semi-nude persons, which were purchased from certain locations in the community. The objection was based on the fact that they were not comparable to the suggestive movements and offensive demeanor shown on the film.

The fact that there may be other or similar violations would not make the film less obscene.

People v. Wenzler, 78 Cal. App. 2d 930, 932 (1947).

III.

The People concur that "knowingly" is an element to be proven as indicated by section 311.2 of the Penal Code. Here, the facts and evidence established the knowledge of the defendants as to the nature of the films in their possession. Scienter is knowledge of the contents. The question of "intent" as set forth in the statute requires proof of "intent to distribute or to exhibit, or offer to exhibit" the films in their possession, and this was also established by the evidence.

People v. Harris, 192 Cal. App. 2d 887, 892.

IV.

The question of whether or not the film was "obscene" was a question of fact for the Court to determine.

People v. Smith, 164 Cal. App. 2d 800.

The statute is sufficiently explicit as to what it proscribes and it is constitutionally sound.

The Defendant, Wenzler, testified as to his extensive knowledge of the motion picture industry and film distribution, particularly in the field of suggestive and erotic films. Likewise, the alleged "experts" for the Petitioners, who do not reside in the Pasadena Community and who had not seen the People's Exhibit I, testified that in their opinion an "obscene" film would be one which shows the entire body in a lewd manner and showing sexual relations on the film. We do not believe that these are the "average persons" who could establish a "standard" for the Community.

It was for the Court to determine from all the evidence, applying contemporary community standards, whether or not petitioners were guilty.

The People contend that the Court properly determined, applying the contemporary community standards, that, to the average person in the community, the dominant theme of the film, People's Exhibit 1 in evidence taken as a whole, appeals to prurient interest, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

Conclusion.

For the foregoing bases and reasons the petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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City Prosecutor,

By DAVID PRESS,
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Attorneys for Respondent.